Supreme Court, U. S.
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In The

Supreme Court of the United States

No. 77-1832

JERRY CARTER SKINNER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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OPINION BELOW

There is no reported Opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Appeal is set forth in petitioner's Appendix.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Officer Poindexter had probable cause to arrest the petitioner for robbery.

2. Whether the statement by the Commonwealth's Attorney violated the due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On September 7, 1977, the petitioner was arraigned for the robbery of Steven Blevins and pled not guilty. A jury heard the evidence and sentenced him to fifteen years in the penitentiary.

Steven Blevins testified that he was robbed by two black males on October 8, 1976, at approximately 2:15 a.m. After untying himself, Blevins called the police and gave a description of the robbers and their automobile.

Officer Walter Poindexter received a radio broadcast at 2:20 a.m. reporting the robbery. The radio dispatcher described the suspects as two black males, one armed with a shotgun, driving a faded blue or silver 1967 Impala station wagon. Poindexter proceeded to the intersection of Davis Ford Road and Hoadly Road. An additional description of Virginia tags and a number 1 Virginia inspection sticker was transmitted by the responding officer from the robbery scene. Another officer radioed that a citizen had advised him that a vehicle matching the description was westbound on Davis Ford Road at a high rate of speed. Shortly after the broadcast of the responding officer, Poindexter spotted the suspects' vehicle, a silvery blue 1967 Oldsmobile station wagon. The vehicle gave a right-turn signal, a left-turn signal, and pulled into a private driveway. Poindexter stated that the driver was lying down in the seat. Another officer aided in frisking the two black males for weapons. A shotgun stock was observed through the opened door on the floorboard. Both individuals were arrested at that time for robbery.

A suppression hearing was held on August 26, 1977, where the defendant's Motion to Suppress the Evidence and Arrest was denied. At the hearing, Officer Poindexter described the similarities of a 1967 Impala station wagon and a 1967 Oldsmobile station wagon.

At trial, the Commonwealth's Attorney, believing that the robbery and firearm indictments were to be tried together, responded to the trial judge "there are two indictments against this man." The defendant's motion to dismiss the jury panel was also denied.

ARGUMENT AGAINST GRANTING OF WRIT OF CERTIORARI

I.

Officer Poindexter Had Probable Cause To Arrest The Petitioner For Robbery.

Probable cause exists when the facts and circumstances known to the arresting officer are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Draper* v. *United States,* 358 U.S. 307 (1959); *Brinegar* v. *United States,* 338 U.S. 160 (1949); *Schaum* v. *Commonwealth,* 215 Va. 498, 211 S.E.2d 73 (1975). The standard of probable cause is determined by the probabilities of factual and practical considerations confronting the arresting officer, not legal technicians.

The facts adduced at the motion to suppress hearing and trial provide ample support for the arresting officer's on-the-scene determination that probable cause existed for the arrest of the defendant. An initial radio broadcast at 2:20 a.m., supplemented by another dispatch at 2:23 a.m., indicated that the suspects were two black males, one armed

with a shotgun, driving a faded blue or silver 1967 Impala station wagon with unknown Virginia license numbers and a number 1 Virginia inspection sticker. The officer positioned himself at an intersection on Davis Ford Road with his lights out. Another officer radioed a citizen's report that a vehicle matching that description was westbound on Davis Ford Road, traveling at a high rate of speed. The station wagon matching the time frame, description and direction of travel, passed the intersection where Poindexter was waiting. He followed the vehicle and observed the car give a right-turn signal without an entrance on that side, then gave a left-turn signal and enter a private driveway. The officer stopped behind the vehicle and observed that it was a silvery blue 1967 Oldsmobile station wagon with a Virginia license, containing two black males. The driver was prone on the front seat with his legs sticking out the door. After the police officer identified himself, the driver got out of the car and raised the hood. Several proddings later, the driver walked back around the car and responded to the officer's orders.

The matching of vehicle and physical descriptions from the three radio broadcasts, coupled with the synchronization of time and direction of travel from the early hour robbery scene, gave the police officer ample probable cause for the arrest.

II.

The Statement By The Commonwealth's Attorney Did Not Violate The Due Process Cause Of The Fourteenth Amendment To The United States Constitution.

The Commonwealth's Attorney, believing that two indictments would be combined in one trial, told the trial judge "there are two indictments against this man."

In questioning the jury, the defense attorney asked "would any member of the panel find it difficult to reach a verdict based solely upon the evidence, rather than the fact of the indictment?" The jury panel made no response. After examining the panel, the attorney indicated to the trial judge that the jury was acceptable. Further, the jury was instructed at the conclusion of the evidence that the indictment by the Grand Jury was not evidence against the defendant and it must not influence their verdict. This inadvertent comment by the Commonwealth's Attorney was miniscule and harmless when compared to the overall circumstances and the corrective action of the trial court.

In *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), the Supreme Court stated that when a petitioner raises the claim that his due process rights were violated as a result of a prejudicial remark by the prosecutor, the merit of the claim will depend upon the totality of the circumstances such that "each case necessarily turns on its own facts." *Id.,* at 240. Furthermore, in *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974), the Supreme Court expressly recognized that federal appellate review of state court proceedings is "the narrow one of due process, and not the broad exercise of supervisory power" that an appellate court would possess in regard to its own trial court. *Id.,* at 642. In *Donnelly,* the Court noted it had taken special care to assure that prosecutorial conduct in no way infringed upon a defendant's rights in those cases where the defendant alleged that the prosecutor's comment so prejudiced a specific provision of the Bill of Rights, as to amount to a denial of that right. After reviewing the record in *Donnelly,* the Supreme Court held against the defendant stating that "here the claim is only that a prosecutor's remark . . .

so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*, at 643.

The Commonwealth contends that the petitioner at bar has asserted essentially the same allegation and thus his case should be controlled by the *Donnelly* decision and therefore dismissed.

CONCLUSION

For the foregoing reasons the respondent respectfully submits that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Deputy Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 27th day of September, 1978, I mailed with first class postage prepaid three true copies of this Respondent's Brief in Opposition to Granting of Writ of Certiorari to Charles W. Sickels, Esquire, 10560 Main Street, Suite 211, Fairfax, Virginia 22030.

JAMES E. KULP
Deputy Attorney General